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In the Supreme Court of the United States

OCTOBER TERM, 1995

RAY A. LEWIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

DREW S. DAYS, III
Solicitor General

JOHN C. KEENEY
Acting Assistant Attorney General

MICHAEL R. DREEBEN
Deputy Solicitor General

RICHARD P. BRESS
Assistant to the Solicitor General

LOUIS M. FISCHER
Attorney

Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTIONS PRESENTED

1. Whether a defendant who is prosecuted in a single proceeding for two petty offenses has a constitutional right to a jury trial if the aggregate sentence authorized for the two offenses exceeds six months' imprisonment.

2. Whether a defendant who would otherwise have a constitutional right to a jury trial may be denied that right because the presiding judge has made a pretrial commitment that the aggregate sentence imposed will not exceed six months.

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OPINIONS BELOW

The opinion of the court of appeals (J.A. 27-34) is reported at 65 F.3d 252. The opinion of the district court (J.A. 14-26) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 5, 1995. The petition for a writ of certiorari was filed on October 20, 1995, and was granted on January 19, 1996 (J.A. 35). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Article III, Section 2, Clause 3 of the Constitution provides in relevant part:

> The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury * * *.

The Sixth Amendment to the Constitution provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed * * *.

STATEMENT

After a bench trial held before a magistrate judge in the United States District Court for the Eastern District of New York, petitioner was convicted on two counts of obstructing the mail, in violation of 18 U.S.C. 1701. He was sentenced to three years' probation, ordered to participate in a drug treatment program, and assessed $10. The court of appeals affirmed. J.A. 27-34.

1. Petitioner was a mail handler for the United States Postal Service. On June 3, 1992, postal inspectors saw him rip open several pieces of mail and place the contents in his pocket. The next day, the postal inspectors routed "test" mail (containing marked currency) through petitioner's work station. The inspectors saw petitioner open the test mail and remove the currency. They arrested petitioner as he was removing currency from yet another letter. C.A. App. 9, 65.

2. Petitioner was charged with two counts of obstructing the mail, in violation of 18 U.S.C. 1701.

J.A. 14, 28. Each count carried a maximum authorized prison sentence of six months.[1] Petitioner requested a jury, but the magistrate judge granted the government's motion for a bench trial. J.A. 12. The magistrate judge reasoned that, because she would not "under any circumstances" sentence petitioner to a total of more than six months' imprisonment, petitioner was not entitled to a jury. J.A. 12, 15, 28. After a one-day trial, petitioner was found guilty on both counts. J.A. 1, 14.

The district court affirmed petitioner's conviction. J.A. 14-26. It rejected petitioner's argument that "the possibility of receiving a [cumulative] sentence in excess of six months, in effect, transformed the two petty offenses into a serious offense, thereby guaranteeing him the constitutional right to a jury trial." J.A. 17. Relying on this Court's decisions in *Baldwin* v. *New York*, 399 U.S. 66 (1970), and *Blanton* v. *City of North Las Vegas*, 489 U.S. 538 (1989), the district court concluded that the right to a jury trial on a criminal charge depends on the severity of the potential sentence for that particular charge, not the seri-

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[1] Section 1701 provides:

> Whoever knowingly and willfully obstructs or retards the passage of the mail, or any carrier or conveyance carrying the mail, shall be fined under this title or imprisoned not more than six months, or both.

Under 18 U.S.C. 19, "the term 'petty offense' means a Class B misdemeanor, a Class C misdemeanor, or an infraction, for which the maximum fine is no greater than the amount set forth for such an offense in section 3571(b)(6) or (7) in the case of an individual." The classification system for federal offenses is set forth in 18 U.S.C. 3559(a). Under that system, Section 1701 is a Class B misdemeanor, 18 U.S.C. 3559(a)(7), and hence a federal petty offense.

ousness of the defendant's overall conduct as measured by the potential aggregate penalty on all of the charges brought in a particular proceeding. J.A. 17-18, 22.[2]

3. The court of appeals affirmed. J.A. 27-34. It too rejected the claim that "potential sentences must be aggregated to determine the right to a jury trial." J.A. 30. The court concluded that consideration of sentences in the aggregate "fail[s] to focus on the appropriate objective criteria." J.A. 31. The appropriate focus, it explained, is not on "the *defendant's* view as to the seriousness of facing over six months imprisonment for aggregate sentences," but rather on "how seriously *Congress* views the offenses in the aggregate." *Ibid.* The court observed that, under 18 U.S.C. 3584(a), absent a contrary court order or statute, "[m]ultiple terms of imprisonment imposed at the same time run concurrently." J.A. 32. The court believed that that indicated a congressional presumption "that multiple offenses prosecuted jointly are no more serious in their aggregate than the most serious single offense of conviction." *Ibid.* The court also saw little reason to view petitioner's jointly tried petty offenses in the aggregate, since petitioner's claimed "right to a jury trial could have been obviated altogether had the government chosen to simply charge both counts * * * in separate informations." *Ibid.*

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[2] The district court also rejected petitioner's claim that the magistrate judge's authority, under 18 U.S.C. 3563(b)(6), to order petitioner to give up his job as a postal worker as a condition of probation was an "additional statutory penalty" that rendered his offenses serious and entitled him to a jury trial. J.A. 22-25. Petitioner has not pursued that argument further.

After concluding that petitioner had no right to a jury trial on his two petty offenses, the court addressed (in dictum) the government's alternative argument that, even if aggregation of the potential sentences for the two offenses were appropriate, petitioner would still have no entitlement to a jury, because the magistrate judge announced before the trial that petitioner would receive no more than a six-month sentence. J.A. 34. The panel suggested that, because the seriousness of an offense is "measured principally by the maximum punishment authorized by Congress," a trial judge's "self-imposed limitations on sentencing" should not "deprive a defendant of his constitutionally protected right to a jury trial." *Ibid.*

SUMMARY OF ARGUMENT

This Court has long held that the Constitution's jury trial guarantee in criminal cases does not extend to petty offenses, *i.e.*, those offenses that, based on objective indications, are regarded by the legislature as relatively less serious. The seriousness of an offense is gauged by the penalty that the legislature provides for a violation. An offense that carries more than six months' imprisonment is a serious offense, to which the right to a jury trial attaches; an offense that carries no more than six months' imprisonment is presumptively petty.

The character of an offense as petty does not change when a charged violation is joined with other petty offense charges. Nor does a right to a jury trial on the petty offense charge spring into being simply because the aggregate penalty for several petty offenses may total more than six months' imprisonment. The reason for rejecting any such aggregation

principle, and for adhering to this Court's consistent offense-based analysis, flows from the basic logic of the petty offense rule. At common law, petty offenses, as a class, were triable to justices of the peace in summary proceedings without juries. That common law history directly led to this Court's conclusion that the constitutional jury trial right has no application to petty offenses. By the same token, the common law affords no support for the suggestion that a person charged with two petty offenses, each triable without a jury, acquires a right to a jury if the cases are tried jointly.

The Sixth Amendment does not alter the focus of the common law—and the Constitution—on whether a particular offense is petty or serious in character. While the Sixth Amendment's jury trial right applies to "criminal prosecutions," it, like the jury trial clause in Article III, reflects the Framers' intention to preserve the common law's treatment of petty offenses as matters not implicating the right to a jury trial. If a single petty offense is not a "criminal prosecution" within the meaning of the Sixth Amendment, there is no valid basis for holding that multiple petty offenses that are joined together somehow become one.

Nor is there a basis for expanding the jury trial right to multiple petty offenses on the ground that a cumulative potential sentence of more than six months' imprisonment is intrinsically serious. This Court has never based its petty offense rule on a subjective view of seriousness, but has instead looked to the common law antecedents of the constitutional jury trial right and to the legislature's determinations of penalties. Similarly, the test is not whether society at large judges a person more harshly if he is

convicted of several offenses. The touchstone in this area is the judgment of the legislature, and legislatures do not, and cannot, assess in advance the potential seriousness of future prosecutions that combine multiple offenses. In any event, an aggregation rule would produce inconsistent results, since it would tie the jury trial right to the prosecutor's decision to join several offenses, or to the court's decision to sever them.

This Court's holdings in the contempt field provide no basis for a general rule requiring aggregation. The Court has ruled that, where a legislature has not specified the penalty that may be imposed for contempt, the actual sentence imposed is the proper measure of "seriousness" for determining the applicability of the jury trial right. The Court has also ruled that when contempts arising from a single trial are adjudicated in post-trial proceedings, the aggregate sentence must be used to assess seriousness. Those rules, which respond to the unique context of contempts where there is no legislative determination of seriousness, have no application to offenses that are, by virtue of the authorized sentences attached, "petty" in the usual sense of the term.

Finally, if this Court were to base the jury trial right on the aggregate penalties that a defendant faces in a single prosecution for multiple petty offenses, it should also hold that no jury trial right exists when the judge makes a pretrial commitment not to impose a sentence of more than six months' imprisonment for the multiple petty offenses. If the seriousness of the prosecution is to be gauged by the potential penalty to be imposed, rather than the legislature's assessment of the seriousness of each offense, a commitment by the judge to limit the

sentence to six months or less makes clear that the ultimate penalty faced by a defendant is not "serious" within the meaning of the Constitution's jury trial guarantee.

ARGUMENT

I. A PETTY OFFENSE IS NOT TRANSFORMED INTO A SERIOUS OFFENSE, REQUIRING A TRIAL BY JURY, BY VIRTUE OF ITS JOINDER WITH OTHER PETTY OFFENSES

"It has long been settled that 'there is a category of petty crimes or offenses which is not subject to the Sixth Amendment jury trial provision.'" *Blanton* v. *City of North Las Vegas*, 489 U.S. 538, 541 (1989) (quoting *Duncan* v. *Louisiana*, 391 U.S. 145, 159 (1968)); accord *Baldwin* v. *New York*, 399 U.S. 66, 68 (1970) (plurality opinion); *Bloom* v. *Illinois*, 391 U.S. 194, 210 (1968); *District of Columbia* v. *Clawans*, 300 U.S. 617, 624 (1937); *Schick* v. *United States*, 195 U.S. 65, 70 (1904); *Lawton* v. *Steele*, 152 U.S. 133, 141-142 (1894); *Callan* v. *Wilson*, 127 U.S. 540 (1888). "In determining whether a particular offense should be categorized as 'petty,'" this Court has focused on "objective indications of the seriousness with which society regards the offense." *Frank* v. *United States*, 395 U.S. 147, 148 (1969). The most relevant objective indication is "the severity of the penalty authorized," *ibid.*, because, "[i]n fixing the maximum penalty for a crime, the legislature 'include[s] within the definition of the crime itself a judgment about the seriousness of the offense.'" *Blanton*, 489 U.S. at 541. In that regard, the Court has concluded that "no offense can be deemed 'petty' for purposes of the right to trial by jury where imprisonment for more than six months is

authorized," *Baldwin*, 399 U.S. at 69 (plurality opinion), and, conversely, that "an offense carrying a maximum prison term of six months or less" presumably is petty, *Blanton*, 489 U.S. at 543. This Court's reliance on the nature of the offense charged, by reference to the sentence it carries, as the gauge of the constitutional right to jury trial remains the proper test, regardless of whether a defendant is charged with only one offense, or with several petty offenses joined together for trial in a single prosecution.[3]

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[3] The Second Circuit's holding in this case that the jury trial right turns on the penalty imposed for that offense, rather than the aggregate punishment that may be imposed for several joined offenses, accords with the holding in *United States* v. *Brown*, 71 F.3d 845, 847 (11th Cir. 1996) ("the 'aggregation' of penalties for multiple petty offenses does not mandate a jury trial"), petition for cert. pending, No. 95-7422. Three courts of appeals have looked to the aggregate penalty imposed in deciding whether a jury trial right attaches to multiple joined petty offenses, but those courts have also held either that a jury trial right does not attach if the magistrate commits before trial not to impose a sentence of more than six months' imprisonment, see *United States* v. *Bencheck*, 926 F.2d 1512, 1518 (10th Cir. 1991), or that a violation of the right to a jury trial can be remedied by imposing a sentence not exceeding six months' imprisonment, see *Rife* v. *Godbehere*, 814 F.2d 563, 565, amended, 825 F.2d 185 (9th Cir. 1987), or that the question whether a jury trial right can be extinguished by a presiding judge's pretrial stipulation to sentence a defendant to no more than six months' imprisonment remains an open one, see *United States* v. *Coppins*, 953 F.2d 86, 90 n.2 (4th Cir. 1991).

A. The Nature Of The Offense Charged Governs The Right To A Jury Trial

This Court has consistently analyzed a defendant's right to trial by jury by specific reference to the character of the offense charged. See, *e.g.*, *Callan*, 127 U.S. at 552 ("[T]here are certain *minor or petty offences* that may be proceeded against summarily.") (emphasis added); *Schick*, 195 U.S. at 68 ("[T]he nature of *the offense*, and the amount of punishment prescribed * * * determine whether *it* is to be classed among *serious or petty offenses*.") (emphasis added); *District of Columbia* v. *Colts*, 282 U.S. 63, 73 (1930) ("Whether *a given offense* is to be classed * * * as *a petty offense* * * * depends primarily upon the nature of *the offense*.") (emphasis added); *Clawans*, 300 U.S. at 630 ("We cannot say that this penalty, when attached to *the offense* of selling second-hand goods without a license, gives *it* the character of *a common law crime* or of *a major offense*.") (emphasis added); *Frank*, 395 U.S. at 149 ("[T]he legislature has included within the definition of *the crime itself* a judgment about the seriousness of *the offense*.") (emphasis added); *Duncan*, 391 U.S. at 159 ("[T]he penalty authorized for *a particular crime* is of major relevance in determining whether *it* is serious.") (emphasis added); *Baldwin*, 399 U.S. at 72-73 (plurality opinion) (referencing line "between *offenses* that are and that are not regarded as 'serious' ") (emphasis added); *Blanton*, 489 U.S. at 543 (question is whether the penalty "reflect[s] a legislative determination that *the offense in question* is a 'serious' one") (emphasis added); *United States* v. *Nachtigal*, 507 U.S. 1, 4 (1993) (per curiam) ("[T]he statutory penalties in other States are irrelevant to

the question whether a particular legislature deemed *a particular offense* 'serious.' ") (emphasis added).

Petitioner argues that this Court's long-standing and consistent focus on "the offense," rather than the prosecution as a whole, reflects only that "in each of the Court's prior cases the parameters of the offense and the prosecution were the same." Br. 14. He maintains that "the prosecution" is the correct level of inquiry, and that where, as here, a single case involves multiple petty offenses, the right to a jury trial is "contingent on the seriousness of the entire prosecution." *Ibid.* Contrary to petitioner's view, the Court's offense-specific focus in defining the constitutional right to a jury reflects the historical fact that, at common law, petty offenses, as a class, were triable without juries.

1. Starting in the sixteenth century, successive Parliaments enacted statutes creating numerous "petty" offenses for which a defendant could be convicted summarily by a justice of the peace. See Felix Frankfurter & Thomas G. Corcoran, *Petty Federal Offenses and the Constitutional Guaranty of Trial by Jury*, 39 Harv. L. Rev. 917, 926-934 (1926). A typical statute of that period would define an offense or class of offenses and vest jurisdiction for all trials of such offense or offenses in justices of the peace. *Id.* at 927; 1 Richard Burn, *Justice of the Peace* 962 (29th ed. 1845) ("The penal statute frequently points out before whom the conviction is to take place."). Parliament thereby effected "a specific withdrawal from trial by jury of specific offenses in specific statutes, rather than a general formula for summary procedure."

Frankfurter & Corcoran, 39 Harv. L. Rev. at 927.[4] The offenses prosecuted before justices of the peace at common law were many and varied, including "[v]iolations of the laws relating to liquor, trade and manufacture, labor, smuggling, traffick on the highway, the Sabbath, 'cheats,' gambling, swearing, small thefts, assaults, [and] offenses to property." *Id.* at 928 (footnotes omitted); see, *e.g.*, *id.* at 928-929 nn.37-51, 930-933 nn.59-81 (citing statutes). Parliament prescribed monetary penalties for some petty offenses, *id.* at 930-931, and corporal punishment or imprisonment for others, *id.* at 932.

The colonists "brought with them the legal traditions of James I, of which summary jurisdiction by justices of the peace was a familiar part." Frankfurter & Corcoran, 39 Harv. L. Rev. at 934-935. Although practices varied among the colonies, and the colonists apparently "entrusted fewer matters to

[4] Although the statutes vesting jurisdiction over petty crimes in justices of the peace did not eliminate the use of juries in so many words, it is undisputed that offenses triable before justices of the peace were subject to conviction without a jury. "Authority given to the justices meant 'the justices' and not 'the justices and jury.'" Frankfurter & Corcoran, 39 Harv. L. Rev. at 929-930; see also 5 William Blackstone, *Commentaries* 280 (1803) ("[T]here is no intervention of a jury, but the party accused is acquitted or condemned by the suffrage of such person only, as the statute has appointed for his judge."); 1 Burn, *supra*, at 958 ("Under this title will be considered only those convictions which take place before magistrates in a summary way, and without the intervention of a jury."). In some cases, the trial of a petty offense required more than one justice of the peace, although the distribution of offenses that required two justices and those that required only one varied over time, apparently with no definite or consistent plan. Frankfurter & Corcoran, 39 Harv. L. Rev. at 927 n.33.

justices than did the contemporary English law," *id.* at 936, they similarly "acted on the conviction that the much-cherished jury procedure was not imperative for small offenses," *id.* at 937. As Frankfurter and Corcoran summarized, "drastically limited does the right of trial by jury seem to have been known to Englishmen for two centuries preceding the separation of the colonies. Alongside of trial before the popular tribunal was trial by magistrates. There were crimes and crimes. The great dividing line was the use of a jury." *Id.* at 933; accord *Clawans*, 300 U.S. at 624 ("At the time of the adoption of the Constitution there were numerous offenses, commonly described as 'petty,' which were tried summarily without a jury, by justices of the peace in England, and by police magistrates or corresponding judicial officers in the Colonies, and punished by commitment to jail, a workhouse, or a house of correction."); see also, *e.g.*, *Murphy* v. *People*, 2 Cow. 815, 819 (N.Y. Sup. Ct. 1824) (observing that Courts of Special Sessions were established in 1744 to hear certain petty offenses, and that, historically, "[n]o right of trial by jury ever existed in those Courts") (citation omitted).

In the absence of any "substantial evidence that the Framers intended to depart from" common law practice, *Duncan*, 391 U.S. at 160, this Court interpreted the constitutional right to a jury to be roughly coextensive with the right as it existed at common law, "the principles and history of which were familiarly known to the framers of the Constitution,"

Schick, 195 U.S. at 69.[5] This Court interpreted the drafting history of the third clause of Section 2, Article III, in light of the contemporary recognition that juries were unavailable for petty offenses at common law. The initial draft of the clause would have provided the right to a jury for "the trial of all *criminal offenses*," but that language was modified to "the trial of all *crimes*," a term that denoted (in then-common usage) "offenses as [we]re of a deeper and more atrocious dye" than "'misdemeanors' only." *Schick*, 195 U.S. at 69-70 (quoting 4 William Blackstone, *Commentaries* 5). This Court concluded, "in the light of the popular understanding" at the time of the Convention "of the meaning of the word 'crimes,'" that the final draft reflected the Framers' "intent * * * to exclude from the constitutional requirement of a jury the trial of petty criminal offenses." *Schick*, 195 U.S. at 70.[6]

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[5] "The language of the Constitution cannot be interpreted safely except by reference to the common law and to British institutions as they were when the instrument was framed and adopted. The statesmen and lawyers of the Convention who submitted it to the ratification of the Conventions of the thirteen States, were born and brought up in the atmosphere of the common law, and thought and spoke in its vocabulary. They were familiar with other forms of government, recent and ancient, and indicated in their discussions earnest study and consideration of many of them, but when they came to put their conclusions into the form of fundamental law in a compact draft, they expressed them in terms of the common law, confident that they could be shortly and easily understood." *Ex parte Grossman*, 267 U.S. 87, 108-109 (1925).

[6] Accord *Callan*, 127 U.S. at 549 ("The word 'crime,' in its more extended sense, comprehends every violation of public law; in a limited sense, it embraces offences of a serious or atrocious character. In our opinion, the provision is to be interpreted in the light of the principles which, at common law, determined whether the accused, in a given class of cases, was entitled to be tried by a jury.").

2. The common law did not accord a jury trial to a defendant who was simultaneously charged with multiple petty offenses, so long as each was independently triable without a jury. Since jurisdiction for the trial of petty offenses was vested in justices of the peace, a petty offense would not have been tried before a jury regardless of its joinder with another petty offense. See 1 Burn, *supra*, at 963 (noting the absence of "objection to the joining and stating of several [petty] offences, in a distinct manner, in the same information and conviction"); see also *id.* at 984 ("The defendant may be convicted in the same conviction in several penalties for several offences."); accord *Paley's Law and Practice of Summary Convictions* 269 (Walter MacNamara ed., 6th ed. 1879) ("There seems * * * to have been no objection to including in one conviction several distinct offences and penalties of the same kind."); see, *e.g.*, *The Queen* v. *Mathews*, 88 Eng. Rep. 609 (Ch. 1710); *The King* v. *Swallow*, 101 Eng. Rep. 1392 (K.B. 1799).[7]

Colonial statutes also ordinarily defined offenses or classes of offenses and vested jurisdiction over all prosecutions of such offenses in magistrates or

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[7] To the extent that any controversy existed over whether single judgments of convictions could include several offenses, the issue was the proper form of a conviction, not the authority of a justice of the peace to try multiple petty offenses in a single proceeding. See *Paley's Law and Practice of Summary Convictions*, *supra*, at 339.

justices of the peace.[8] Some colonies instead empowered judicial officers to try all offenses that carried penalties below a prescribed maximum. See, *e.g.*, *Charters & General Laws of the Colony & Province of Massachusetts Bay* 68 (1814) (statute adopted in 1651 authorizing trial of misdemeanors by commissioners in Boston, "provided the fines imposed by them, do not exceed forty shillings for one offence"); 2 *Statutes at Large of Pennsylvania from 1682 to 1801*, at 19 (1896) (statute passed in 1700 providing that, in a trial for a petty offense, "where the fine doth not exceed twenty shillings, one or more justices of the peace, upon due proof of the offense, or being committed in his or their presence, may determine and give judgment"). We are not aware of any colonial statute, however, that conditioned the right to a jury

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[8] A typical statute of the times, passed in 1771 (see 5 *Colonial Laws of New York* 237 (1894)), provided as follows:

> [A]ny Person or Persons [who] shall wilfully break any Glass Window or Windows, Porch or Porches, Knocker or Knockers, * * * and being thereof convicted before one or more Justice or Justices of the Peace * * * either by the Confession of the Party or Parties so offending, or the Oath of one or more Credible Witness or Witnesses (which Oath the said Justice or Justices of the Peace is and are hereby impowered and required to administer) shall for every such Offence as aforesaid forfeit the Sum of ten Pounds.

If the offender failed to pay, "every such Justice or Justices of the Peace [was] impowered and required * * * to commit * * * such Person * * * to the Common Goal [*sic*] * * *, there to remain without Bail * * * for the space of one Month unless such Forfeiture or Forfeitures be sooner paid." *Id.* at 238. See also Frankfurter & Corcoran, 39 Harv. L. Rev. at 983-1019 (citing numerous colonial statutes vesting jurisdiction over petty crimes in magistrates or justices of the peace).

trial in a case involving multiple offenses on the potential cumulative penalty for the entire prosecution.

3. Petitioner does not dispute the common law's focus on the seriousness of distinct offenses. Instead, he argues (Br. 14-15) that, because the Sixth Amendment right to a jury trial applies in "criminal prosecutions," the existence of that right depends on the nature of the prosecution as a whole. That is incorrect. Although the Sixth Amendment uses the phrase "criminal prosecutions," in lieu of Article III's reference to "crimes," this Court rejected long ago the notion that "the amendment was intended to supplant that part of the third article which relates to trial by jury." *Callan*, 127 U.S. at 549. The Sixth Amendment merely "enumerates the elements of 'trial by jury' in Article III; it does not extend the field of its operation." Frankfurter & Corcoran, 39 Harv. L. Rev. at 971. In light of the origins of the Sixth Amendment, "it is clear that the scope of trial by jury guaranteed by the Sixth Amendment is identical with the scope of jury trial in Article III. Evidence is wholly lacking of a desire for change." *Ibid.*

Even if it could be said that the right to a jury trial attaches to "criminal prosecutions," rather than to prosecutions for "crimes," that would not, in any event, justify extending the right of trial by jury to prosecutions involving solely petty offenses. Petitioner does not contend that the Sixth Amendment guarantees the right to a jury trial in all criminal prosecutions. Rather, he concedes (Br. 9-13) that a single petty offense may be tried without a jury and thus implicitly acknowledges that the prosecution of a single petty offense is not a "criminal prosecution[]" within the meaning of the Sixth Amendment.

If one charge of a petty offense is not a "criminal prosecution," nothing in the language of the Sixth Amendment supports the view that the joinder of several petty offenses in a single case transforms the whole into a "criminal prosecution" within the meaning of the jury trial right.

4. Although this Court has, over time, modified its approach to determining whether a particular offense carries the right of jury trial, the Court has always maintained its focus on the character of the offense charged. Initially, in *Callan*, the Court defined as "petty or minor" those offenses that were "not of the class or grade triable at common law by a jury." 127 U.S. at 555. Determining the common law character of an offense was impracticable in many cases, however, because of "the substantial number of statutory offenses lacking common law antecedents." *Blanton*, 489 U.S. at 541 n.5. When there was no common law analogue, the Court initially looked primarily to whether the charged offense was by "nature" comparable with common law crimes. See *Schick*, 195 U.S. at 68; *Colts*, 282 U.S. at 73. Under that approach, the Court considered the "moral quality" of an offense, defining as petty those offenses "not * * * necessarily involving any moral delinquency," *Schick*, 195 U.S. at 67, and as serious those "act[s] of such obvious depravity that to characterize [them] as * * * petty offense[s] would be to shock the general moral sense," *Colts*, 282 U.S. at 73.

In 1937, the Court repudiated the view that seriousness is inherent in the nature of an offense. *Clawans*, 300 U.S. at 625. Recognizing that attempts to identify the nature of an offense invited "recourse of the judge to his own sympathy and emotions," the Court directed inquiry instead to "the laws and practices of

the community" as a gauge of the locality's "social and ethical judgments." *Id.* at 628. Invoking a mode of analysis earlier suggested in *Schick*, 195 U.S. at 68, the Court concluded that the maximum authorized penalty was the best "objective indication[] of the seriousness with which society regard[ed] the offense," *Frank*, 395 U.S. at 148.

In 1968, the Court held that the entitlement to a jury in criminal trials is a fundamental right guaranteed by the Fourteenth Amendment. *Duncan*, 391 U.S. at 149. Application of the right to state criminal trials brought into play a vastly expanded range of offenses, *Scott* v. *Illinois*, 440 U.S. 367, 372 (1979), which exacerbated the difficulty of identifying common law equivalents. Recognizing that difficulty, the Court clarified that the key factor in characterizing an offense is the maximum authorized penalty. In *Baldwin*, a plurality of the Court concluded that "no offense can be deemed 'petty' for purposes of the right to trial by jury where imprisonment for more than six months is authorized," 399 U.S. at 69; in *Blanton*, it adopted the converse presumption, *i.e.*, that "an offense carrying a maximum prison term of six months or less" is a petty offense, 489 U.S. at 543. The latter presumption is rebuttable only upon a showing by the defendant "that any additional statutory penalties, viewed in conjunction with the maximum authorized period of incarceration, are so severe that they clearly reflect a legislative determination that the offense in question is a 'serious' one." *Ibid.*

This Court's adoption of a quantitative measure of the seriousness of an offense does not entail the proposition that the constitutional measure of seriousness turns on the aggregation of penalties

available for jointly tried petty offenses.[9] The focus of the Court's inquiry is, and has always been, on the character of the particular offenses with which defendants have been charged. That is a logical corollary of the textual justification for nonjury trials in petty offense cases. The petty offense rule rests on the conclusion that the Constitution, as the common law before it, reserves the jury trial right for prosecutions for serious offenses. Just as the common law did not define the petty offense jurisdiction of justices of the peace by reference to the cumulative penalties at issue in a case, the Constitution does not base the jury trial right on the sum of the potential terms of imprisonment authorized for distinct but jointly tried petty offenses.[10]

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[9] Petitioner errs in suggesting (Br. 20) that *United States* v. *Goodwin*, 457 U.S. 368 (1982), supports a constitutionally required aggregation rule. In that case, the Court rejected a claim that a prosecutor's decision to recharge a more serious offense after the respondent demanded a jury trial on less serious charges raised a presumption of prosecutorial vindictiveness. The Court did not address whether the defendant in that case in fact had the right to a jury trial on the basis of the multiple offenses originally charged.

[10] Petitioner argues (Br. 24-26), for the first time in this case, that he has the right to a jury trial because his conduct—stealing from the mails—was chargeable as a felony in England and in the colonies and punishable by death. In our view, *Blanton* ruled out consideration of how an offense was viewed at common law. See *Blanton*, 489 U.S. at 543 (presumption that crime with six-month sentence is petty is rebuttable "only" by a showing that the total authorized penalty is serious); *Nachtigal*, 507 U.S. at 4 (same). In any event, that issue is not properly before this Court. Petitioner argued in the courts below and in his petition for a writ of certiorari that he merited a jury trial because the cumulative maximum authorized penalties for his petty offenses exceeded six months. He did not claim (or so much as suggest in his petition) that he believed that the individual offenses were not petty because charges of stealing from the mails were triable by jury at common law. That new-found claim is not fairly included in the question presented, and it is therefore beyond the scope of this case. (Whether theft from the mails was *chargeable* as a felony at common law would not, in any event, be the relevant question. Irrespective of the conduct in which petitioner was actually engaged, the question would be whether the offense with which he was charged—obstruction of the mails—was triable by jury at common law. Petitioner cites no evidence that it was.)

B. The Right To A Jury Trial Does Not Depend On The Conduct Involved In A Prosecution For Multiple Petty Offenses

Petitioner claims that the right to trial by jury must extend to proceedings involving multiple petty crimes because (i) no defendant should face the possibility of more than six months' imprisonment without being afforded the right to a jury (Br. 19-21); and (ii) "[s]ociety is affected by, and hence judges, a defendant's conduct as a whole" (Br. 16). Those considerations are not relevant to the constitutional test.

The limitation of the jury right to serious offenses does not stem from this Court's normative view that the jury, rather than a judge, is the appropriate decisionmaker when severe penalties may be imposed in a criminal case.[11] Rather, it stems from the Court's interpretation of the text of the Constitution.

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[11] This Court's reference in *Duncan* to "the right of jury trial in serious criminal cases," 391 U.S. at 156, and the plurality's statements in *Baldwin* to the effect that an accused has the right to interpose a jury "between himself and a possible prison term of over six months," 399 U.S. at 72, have no fair import beyond the context of those cases, *i.e.*, prosecutions for a single charged offense.

That interpretation rests on the Framers' grounding in a common law system that did not provide a jury trial for the prosecution of crimes that the legislature viewed as petty—a judgment that did not change simply because an offender may have committed many petty offenses.

Nor does the likelihood that society will judge a person based on the totality of his conduct dictate that the right to a jury trial be analyzed on that level of generality. The right to a jury turns on the legislature's assessment of the seriousness of particular offenses, not on the imprecise contours of a defendant's "conduct as a whole." A legislature calibrates the seriousness of an offense by authorizing the range of penalties that the offense carries. Legislatures do not assess the seriousness of entire prosecutions.[12]

Although we do not believe that the presumption in 18 U.S.C. 3584(a) that sentences run concurrently

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[12] Nor, ordinarily, do legislatures determine the seriousness of particular combinations of offenses. Legislatures of course may, and sometimes do, authorize the aggregation of petty offenses committed in tandem to create a single serious offense. Section 22-3802 of the D.C. Code (1989), for example, provides that "[a]mounts received pursuant to a single scheme or systematic course of conduct in violation of § 22-3811 (Theft), 22-3821 (Fraud), or 22-3823 (Credit Card Fraud) may be aggregated in determining the grade of the offense and the sentence for the offense." Two second-degree thefts involving the property of separate members of the same household could be aggregated under that statute to meet the threshold amount for a first-degree theft. Where such a first-degree theft is charged, the enhanced penalty authorized by Section 22-3802 is an "objective indication," *Blanton*, 489 U.S. at 541, that the legislature views the multiple, related petty offenses as constituting a single serious offense.

(unless the judge otherwise orders or a statute otherwise requires) reflects a congressional belief that the commission of two offenses is no more serious than the commission of a single offense,[13] petitioner errs in suggesting that Section 3584(a)'s authorization of consecutive sentences reflects a congressional belief that the commission of two offenses in tandem warrants cumulative punishment. Congress judges seriousness offense-by-offense. It cannot assess the seriousness of all potential combinations of offenses, and it has not made any attempt to do so. A defendant who is charged with committing two offenses is exposed to consecutive sentences because each distinct offense carries its own maximum authorized penalty—not because Congress has determined that the overall conduct with which he is charged warrants that particular aggregate sentence.

Indeed, the cumulative penalty that a defendant faces as a consequence of multiple petty offense

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[13] Section 3584(a) provides in relevant part:

> If multiple terms of imprisonment are imposed on a defendant at the same time, or if a term of imprisonment is imposed on a defendant who is already subject to an undischarged term of imprisonment, the terms may run concurrently or consecutively * * *. Multiple terms of imprisonment imposed at the same time run concurrently unless the court orders or the statute mandates that the terms are to run consecutively. Multiple terms of imprisonment imposed at different times run consecutively unless the court orders that the terms are to run concurrently.

That provision provides a rule of construction for situations in which the sentencing judge fails to specify whether a defendant's sentences are to run concurrently or consecutively. See *United States* v. *Joetzki*, 952 F.2d 1090, 1098 (9th Cir. 1991); S. Rep. No. 225, 98th Cong., 1st Sess. 127 (1983).

charges provides no consistent assurance of a jury trial right, even under petitioner's own theory. Petitioner conceded below that the government could lawfully have severed the two counts with which he was charged and tried them separately, and that "the question of [his] right to a jury trial [would thereby] have been obviated altogether." J.A. 32; see also J.A. 18-19. Petitioner's acknowledgement that under his approach petty offenses tried jointly would be treated differently from the same offenses tried separately demonstrates that the constitutional right to a jury trial does not, and cannot, turn on the totality of charged criminal conduct.

Under petitioner's approach, a defendant charged with two petty offenses would have a right to a jury trial on both if the prosecutor elected to charge the offenses together in a single information, and on neither if the offenses were charged separately, unless the trial judge severed the charges in the former circumstance or joined them in the latter, in which case, the defendant's positions would be reversed. Aggregation would thus give prosecutors and, to a lesser extent, judges the power to control the "seriousness" of the prosecution.[14] The prosecutor's

[14] As a matter of policy, the federal government will not generally bring charges based on substantially the same acts or transactions that formed the basis for a prior state or federal criminal proceeding. See *Rinaldi* v. *United States*, 434 U.S. 22, 27 (1977) (per curiam); *Petite* v. *United States*, 361 U.S. 529 (1960) (per curiam). That policy had no application in this case, which involved distinct crimes committed on successive days. In any event, except where successive prosecution would implicate the Double Jeopardy Clause, *e.g.*, *Ashe* v. *Swenson*, 397 U.S. 436 (1970), the government's charging policy is not constitutionally compelled. It cannot be invoked as a bar to

decision whether to join or sever counts, moreover, bears no relation to the principles underlying the right to a jury trial. Trying counts together is a "[j]udicial efficiency imposed at no greater risk to the defendant." *United States* v. *Coppins*, 953 F.2d 86, 92 (4th Cir. 1991) (Niemeyer, J., dissenting). "The mere fact that the government [chooses] to consolidate the charges provides no greater justification for a jury trial than if the charges were tried separately." J.A. 32.[15]

Since the desire to proceed efficiently does not "elevate the[] seriousness of the offenses" or change "the risk to the defendant," it should logically have no effect on "whether the defendant is given a jury trial." *Coppins*, 953 F.2d at 92 (Niemeyer, J., dissenting). As one of petitioner's amici argues, "[i]n

federal prosecution, see, *e.g.*, *United States* v. *Mitchell*, 778 F.2d 1271, 1276-1277 (7th Cir. 1985) (citing cases), and it quite clearly does not constrain the charging protocol of state prosecutors.

[15] This Court adopted similar reasoning in *Deal* v. *United States*, 113 S. Ct. 1993 (1993). That case involved 18 U.S.C. 924(c), which provides enhanced penalties "[i]n the case of * * * [a] subsequent conviction." This Court rejected the petitioner's argument that the term "subsequent conviction" does not include a second conviction within a single proceeding, but only "a judgment of conviction entered at a later time," 113 S. Ct. at 1996, in part because the petitioner's interpretation "would [have] give[n] a prosecutor unreviewable discretion either to impose or to waive the enhanced sentencing provisions * * * by opting to charge and try the defendant * * * in separate prosecutions," *id.* at 1997. Observing that, under the petitioner's view, "enhanced sentencing would clearly have been required" if "the same charges had been divided into six separate prosecutions for the six separate bank robberies," the Court declined "to give the statute a meaning that produces such strange consequences." *Ibid.*

order for a defendant to raise the aggregation argument, he must accept that some crimes are not triable by jury, i.e., those criminal offenses carrying a penalty of six months or less. Having accepted this initial premise, the *seriatim* argument is logically unanswerable as the inherent non-jury character of these offenses is not essentially altered by their aggregation in a single proceeding." Jury Trial Group Amicus Br. 3.[16]

Petitioner's amici, the National Legal Aid and Defender Association *et al.*, suggest (Br. 6-8) that, if the constitutional right to trial by jury is not based on the seriousness of the entire prosecution, a legislature could nullify the jury trial right by artificially subdividing criminal conduct into small increments (*e.g.*, defining the offense of unlawful possession of ammunition as the unlawful possession of a single bullet), and authorizing a six-month sentence for each incremental wrong. That would permit the imposition of a significant cumulative sentence without a jury trial. Br. 7-8. A legislature that viewed a crime as serious and deserving of lengthy imprisonment, however, would not likely subdivide it into six-month offenses and thereby leave to the

[16] Petitioner suggests (Br. 22) that arguing that no jury is required in multiple offense trials because the offenses could have been prosecuted separately is akin to arguing that no jury is required for the trial of a serious felony because the defendant could have been charged instead with a petty offense. The arguments are, however, quite different. Prosecutions for two petty offenses carry the same cumulative potential penalties regardless of whether the offenses are tried jointly or severally; a felony conviction, however, ordinarily carries serious collateral consequences and social stigma that could never result from prosecutions for less serious offenses.

discretion of individual prosecutors and judges the decision whether to treat it as such. And there is no evidence that legislatures actually have any inclination to gerrymander offenses so as to avoid jury trials. "The process of Constitutional adjudication does not thrive on conjuring up horrible possibilities that never happen in the real world." *New York* v. *United States*, 326 U.S. 572, 583 (1946) (opinion of Frankfurter, J.); cf. *McMillan* v. *Pennsylvania*, 477 U.S. 79, 89 (1986) (rejecting argument based on "specter raised by petitioners of States restructuring existing crimes in order to 'evade'" *In re Winship*, 397 U.S. 358 (1970)).

C. The Analogy To Contempt Trials Lacks Merit

This Court's decision in the contempt context in *Codispoti* v. *Pennsylvania*, 418 U.S. 506 (1974), provides no support for petitioner's argument that the aggregate penalty determines the right to a jury in prosecutions for multiple petty offenses. Codispoti and two co-defendants in a criminal trial, each acting as his own counsel, were cited with several counts of contempt arising from incidents that had occurred during their trial. Following the underlying proceedings, they were each charged, tried, and convicted for multiple contempts, and they were each sentenced to multiple consecutive one-year and two-year terms of imprisonment. The state supreme court affirmed the contempt charges, but this Court vacated them, with the instruction that "on remand another judge, not bearing the sting of [the contemnors'] slanderous remarks and having the impersonal authority of the law, sit[] in judgment on the[ir] conduct." *Mayberry* v. *Pennsylvania*, 400 U.S. 455, 466 (1971). Codispoti and his co-defendants were then convicted once again

on the multiple contempt charges, this time in separate proceedings before a different trial judge. Codispoti was sentenced to six months in prison for each of six contempts and a term of three months for another, each sentence to run consecutively; his co-defendant Langnes was sentenced to five terms of six months each and one term of two months, all to be served consecutively. See *Codispoti*, 418 U.S. at 507-510.

Because the Pennsylvania legislature had established no maximum authorized penalty for contempt, this Court looked to the aggregate penalties actually imposed by the trial court to determine whether the offenses charged against the contemnors were "serious" or "petty." 418 U.S. at 511. The Court explained that, "where no legislative penalty is specified and sentence is left to the discretion of the judge, as is often true in the case of criminal contempt, the pettiness or seriousness of the contempt will be judged by the penalty actually imposed." *Ibid.*; accord *Bloom*, 391 U.S. at 197-201. The Court then applied that principle to the aggregate sentences for contempt, all of which "arose from a single trial, were charged by a single judge, and were tried in a single proceeding." 418 U.S. at 517. Looking to the total sentence, the Court found the existence of a jury trial right on the facts before it. *Ibid.*

Nothing in *Codispoti* suggests that the Court was adopting an approach applicable to the ordinary case, in which a legislature has determined the maximum authorized penalty for each charged offense. The holding in *Codispoti* itself derived largely from concerns unique to charges of criminal contempt. Contemptuous conduct, "though a public wrong, often strikes at the most vulnerable and human qualities of

a judge's temperament. Even when the contempt is not a direct insult to the court or the judge, it frequently represents a rejection of judicial authority, or an interference with the judicial process or with the duties of officers of the court." *Bloom*, 391 U.S. at 202. Moreover, unlike ordinary prosecutions, with criminal contempt "it is normally the trial judge who, in retrospect, determines which and how many acts of contempt the citation will cover. It is also he or * * * another judge who will determine guilt or innocence absent a jury, who will impose the sentences and who will determine whether they will run consecutively or concurrently." *Codispoti*, 418 U.S. at 515. Particularly in light of the "recurring necessity [in the federal system] to set aside punishments for criminal contempt as either unauthorized by statute or too harsh," *Bloom*, 391 U.S. at 206, this Court "has long recognized the potential for abuse in exercising the summary power to imprison for contempt," *id.* at 202. That unique potential for abuse presents a "compelling argument * * * for providing a right to jury trial." *Ibid.*

In *Codispoti*, moreover, since the trial judge waited until the conclusion of the underlying criminal proceedings to charge the various contempts, the most "realistic view of what [actually] occurred [in *Codispoti*] was that," notwithstanding the trial judge's *post hoc* identification of separate contemptuous acts, "there was only one contempt—[each contemnor's] trial conduct as a whole." *Commonwealth* v. *Langnes*, 255 A.2d 131, 136 (Pa. 1969) (O'Brien, J., concurring in part and dissenting in part), vacated and remanded *sub nom. Mayberry* v. *Pennsylvania*, 400 U.S. 455 (1971). "[T]he only measure of the seriousness of * * * [the]

contemnor's criminal acts," therefore, was "the entirety of the court's sentence." J.A. 33. No decision of this Court, however, has applied the rule announced in *Codispoti* to cases in which multiple violations of a criminal statute constitute distinct crimes.[17] Nor should *Codispoti* have application to cases in which the legislature's action has defined the seriousness of the offense by establishing its authorized punishment.

II. IF A DEFENDANT'S JURY TRIAL RIGHT DOES TURN ON AGGREGATING THE POTENTIAL SENTENCES FOR MULTIPLE PETTY OFFENSES, THERE IS NO RIGHT TO A JURY WHERE A JUDGE MAKES A PRETRIAL COMMITMENT TO LIMIT THE AGGREGATE SENTENCE, UPON CONVICTION, TO SIX MONTHS' IMPRISONMENT

The foregoing analysis demonstrates that a defendant's right to a jury trial depends on the maximum sentence authorized for the offense charged, and that when the penalty for an offense establishes that it is petty, it need not be tried by a jury regardless of the number of such offense jointly to be tried. If, however, this Court were to determine that the jury

[17] Contrary to petitioner's argument (Br. 18 n.3), the "aggregation principle" of *Codispoti* does not follow from *Baldwin*. The cited passage in *Codispoti* (418 U.S. at 512 n.4) simply parsed the various concurring and plurality opinions in *Baldwin*. Nor did *Blanton* elevate *Codispoti* to the status of a general guide to the Sixth Amendment; rather, it cited *Codispoti* for the unremarkable proposition that *Baldwin* had held "that a potential sentence in excess of six months' imprisonment is sufficiently severe by itself to take the offense out of the category of 'petty.'" *Blanton*, 489 U.S. at 543 n.7 (citing *Codispoti*, 418 U.S. at 512 n.4).

trial right turns instead on the "seriousness" of the entire prosecution as measured by the aggregate potential penalty, it would not help petitioner. Before trial, the magistrate judge in this case announced that she would not "sentence [petitioner] to more than six months in prison under any circumstances." J.A. 12. A judge's pretrial decision to limit the total punishment that the defendant may receive to no more than six months' imprisonment means that the entire prosecution does not pose the risk of imposing a "serious" penalty. Accordingly, a trial of multiple petty offenses in those circumstances does not trigger the constitutional right to a jury.

The premise of the aggregation theory is that "an accused [has] the right to interpose between himself and a *possible prison term of over six months*[] the commonsense judgment of a jury of his peers," Br. 19 (quoting *Baldwin*, 399 U.S. at 72 (plurality opinion)) (emphasis added by petitioner). It stands to reason, under that theory, that an accused who does not face a "possible prison term of over six months" for petty offense violations should have no similar right. Indeed, petitioner's reliance on *Codispoti*, *supra*, for the aggregation principle virtually compels that result; the Court stated in that case that, where the contempt penalty is left to the discretion of the judge, "the pettiness or seriousness of the contempt will be judged by the penalty actually imposed." 418 U.S. at 511; *Bloom*, 391 U.S. at 211.[18]

[18] A trial judge's pretrial commitment to sentence a defendant charged with a serious felony to no more than six months' imprisonment would not, of course, affect that defendant's right to a jury trial. See Nat'l Legal Aid and Defender Ass'n Br. 28. The difference is that, on an aggregation theory, the "seriousness" of a prosecution for multiple petty offenses

Contrary to the view of petitioner's amici (Nat'l Legal Aid and Defender Ass'n Br. 29-30), there is no "serious practical objection to basing the right to jury trial" on the presiding judge's pretrial commitments regarding sentencing. The proposition (*ibid.*) that "[j]udges cannot make sentencing decisions before trial" is refuted by *Scott* v. *Illinois*, *supra*, and Federal Rule of Criminal Procedure 58(a). In *Scott*, this Court held that a defendant has no right to appointed counsel in a misdemeanor case if he is not ultimately sentenced to a term of imprisonment; courts administering that rule necessarily will often determine before trial whether imprisonment is likely.[19] Likewise, Rule 58(a)(2) provides that the Federal Rules of Criminal Procedure have no force in petty offense prosecutions in which "no sentence of

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results from the happenstance of the combination of distinct offenses committed by a particular defendant and the decision of the prosecutor and the judge to try those offenses jointly, not from a specific legislative judgment that the whole of the prosecution is more "serious" than the sum of the individual offenses. In the case of a serious felony, however, the legislature has made a categorical judgment about the character of the offense, and that legislative judgment is not open to reversal by the action of an individual judge.

[19] Although *Scott* involved a state prosecution, this Court has since described it as holding that, "where no sentence of imprisonment [i]s imposed, a defendant charged with a misdemeanor ha[s] no constitutional right to counsel," *Nichols* v. *United States*, 114 S. Ct. 1921, 1925 (1994), without differentiating between state and federal contexts. As petitioner concedes (Br. 34 n.12), the courts of appeals that have ruled on the issue have concluded that *Scott* applies in federal court. See *United States* v. *Reilley*, 948 F.2d 648 (10th Cir. 1991); *United States* v. *Doe*, 743 F.2d 1033 (4th Cir. 1984).

imprisonment will be imposed." The rules contemplate that that determination will made before trial:

> The term "petty offenses for which no sentence of imprisonment will be imposed" as used in this rule, means any petty offenses as defined in 18 U.S.C. § 19 as to which the court determines, that, in the event of conviction, no sentence of imprisonment will actually be imposed.

Fed. R. Crim. P. 58(a)(3). As a matter of practice, therefore, federal judges deciding whether to appoint counsel for a defendant or to apply the Federal Rules of Criminal Procedure to a petty offense case must determine before trial whether they wish to preserve the option of imposing a term of incarceration.

Although the parameters of the right to a jury trial are not the same as the parameters of the right to counsel, *Argersinger* v. *Hamlin*, 407 U.S. 25, 30 (1972), and the right to trial by jury is not affected by the Federal Rules of Criminal Procedure, *Scott* and Rule 58(a) demonstrate that trial judges have the authority to determine pretrial that a defendant charged with petty offenses will not receive the maximum authorized sentence of imprisonment. And while petitioner's amici assert that "[t]here is an important practical difference * * * between the decision in *Scott* [and under Rule 58(a)(2)] to promise to impose no jail time, and the finer distinction of whether to impose more or less than six months' imprisonment," Nat'l Legal Aid and Defender Ass'n Br. 29 n.21, the distinction is unfounded. To the extent that the concern is that sentencing decisions are being made "before trial without information about the defendant and the offense" (*id.* at 29), a judge constrains his sentencing discretion less

severely by limiting the amount of potential jail time than by promising to impose no term of imprisonment whatsoever.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

JOHN C. KEENEY
Acting Assistant Attorney General

MICHAEL R. DREEBEN
Deputy Solicitor General

RICHARD P. BRESS
Assistant to the Solicitor General

LOUIS M. FISCHER
Attorney

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